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Reasoning in a Circle of Law

Roger J. Traynor


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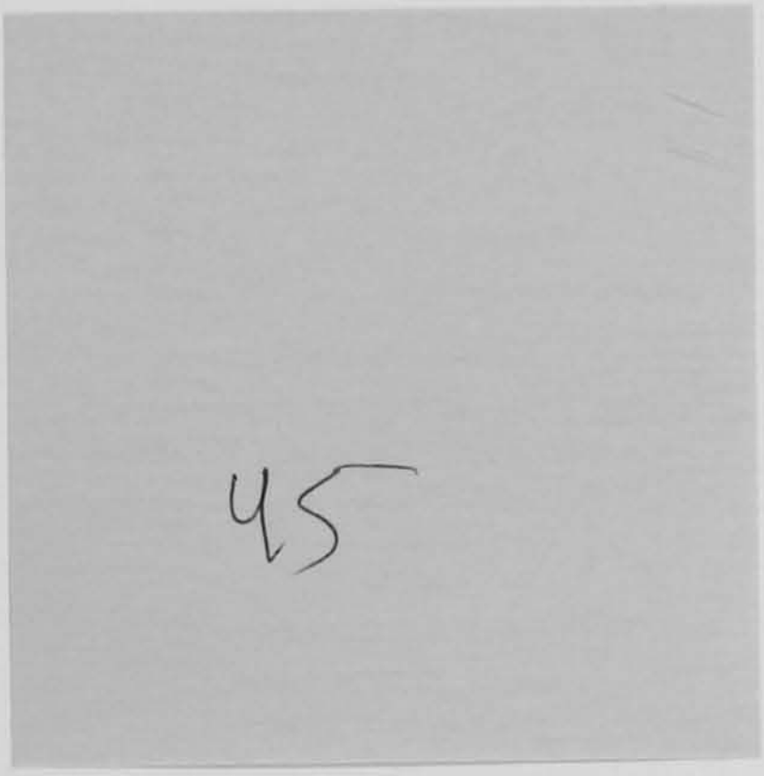
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REASONING IN A CIRCLE OF LAW

By

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REASONING IN A CIRCLE OF LAW*

*Roger J. Traynor***

THERE are few great pioneers in any field, for greatness is by definition rare. In law as in other fields, however, we do not lack priests of high fashion who reject established ways to establish their own for slavish followers. Once it was high fashion to endorse the status quo automatically, too often without rhyme or reason. The conventional wooden square was in, and woe befell any lawyer or judge who did not fit his decision or brief squarely within its straight lines. Everyone who counted knew where he stood, even if he only stood in a corner. As for anyone who wanted to know where *she* stood, she soon learned. She usually stood outside the pale of the laws of descent or ascent or dissent. All that remained to her was dissolution in tears. Hardly anyone dreamed that some day one of her kind, preoccupied with bearing children, preferably male for property relevance, would walk into a Yankee legislature and bear tidings that began: "Brothers, I have news for you." Hardly anyone dreamed that some day the rights of people in general would cease to be only on the periphery of a worm's-eye view of property rights.

Now, the sedentary squares of the status quo are put down if not out, and the floating circles of law reform are in, hanging loose. Their pitchmen proclaim the absence of dust-collecting corners in the new products and guarantee them for at least ninety days. Best of all, these novel circles can stretch into other sizes and shapes. There are few to question the new dogma that ascribes to them an automatic relevance to current problems. The very term, *law reform*, evokes the mystique of relevance. It conveys assurance, like a miracle fabric, that all will be well as soon as it is pressed or unpressed into service. If one fabric fails, there is always another and another ready for use, and failures disappear from view in the endless busyness of fabrication.

As one receptive to change but wary of dogma in old forms or new,

*Law Day address delivered at the University of Virginia on May 2, 1970. In developing the theme of this address the author found it relevant to invoke at various junctures some reflections that he has set forth in previous addresses. Interestingly enough, time has made them more timely than ever.

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I view with interest the production of contemporary circles, well-rounded or stretched out into new patterns, and stand ready to heed prosaic or well-rhymed reasoning on behalf of their miracle fabrics. Nonetheless you will note alternate warnings throughout the comment I now undertake on how lawmakers can best reason amid the new circles of law. The first warning, not always agreeable to the old, is that there is no assurance of continuing virtue in age and custom per se. The second warning, not always agreeable to the young, is that there is no assurance of full-blown virtue in youth and innovation per se.

With these warnings in mind, we can now proceed to note a salient change in lawmaking. Once the province mainly of courts, which brought to it slow, old-fashioned, often inefficient ways, it is now the province mainly of legislatures, of Congress and state assemblies and town councils, which bring to it newfangled ways that at worst breed new inefficiency or engender an efficiency at odds with reason. The hyperproductivity of this expanding field of lawmaking carries the mark of an age of plenty and the attendant risks of pollution.

Receptive we may be to an abundance of new riches in the law, but we cannot let them accumulate in such haphazard heaps that they confuse the law at the expense of rational reform. Hence, as legislatures increase their already formidable output of statutes, courts must correspondingly enlarge their responsibility for keeping the law a coherent whole.

It is no secret that a legislature usually makes much more law in a session via statutes than a court does over a long period of time via the painstaking application or adaptation of common-law rules and the occasional innovation of a new one. Legislators are free to experiment, to draft laws on a massive scale or ad hoc in response to what they understand to be the needs of the community or the community of interests they represent. The legislators themselves are experiments of a sort; they are on trial until the next election and must prove in the interim that they can make laws acceptable to their time and place, even though many of them may not be lawyers.

What a legislature does, however, it can undo without much ado. If some of its purported miracle fabrics fail to prove miraculous, they need no longer remain on the shelves. We can lament that they sometimes do, but we need not despair; they rarely survive indefinitely. Bumbling though the legislative process may be, it is more readily self-correcting than the judicial process. Given its flexibility, we can accept amiably that when a legislature is good, it can be very, very good, but

that when it is bad, it is horrid. We can also in some measure resign ourselves to how ingeniously it sometimes abstains from any action, how mysteriously it sometimes moves its wonders not to perform. We can reconcile ourselves to its swings of quality so long as the people exercise responsibly their power to keep it in fact a do-gooder, a reformer of the law.

It could not be otherwise in the modern world that for better or worse the legislatures have displaced courts as our major lawmakers. We have come a long way from the time when courts were on guard to keep statutes in their place, in the shadow of precedent. In most of their affairs people who seek out new rules of law now look to the next legislative session, not to the day of judgment. In street wisdom, it is easier to legislate than to litigate. A legislature can run up a law on short notice, and when it has finished all the seams, it can run up another and another. It is engaged in mass production; it produces piecework of its own volition or on order. The great tapestry of Holmes' princess, the seamless web of the law, becomes ever more legendary.

Whatever our admiration for ancient arts, few of us would turn the clock back to live out what museums preserve. The law of contracts was once well served by delightful causeries of learned judges that clarified the meaning of obligation. Such causeries, however, proved inadequate to provide an expansion and diversification of words to correspond with that of business enterprise. Thus it fell to the legislators to spell out whole statutes such as insurance codes and the uniform laws dealing with negotiable instruments, sales, bills of lading, warehouse receipts, stock transfers, conditional sales, trust receipts, written obligations, fiduciaries, partnerships, and limited partnerships.

There followed in the United States another development, a state-by-state adoption of the Uniform Commercial Code, the culmination of years of scholarly work sponsored by the American Law Institute and the Commissioners on Uniform State Laws. Such statutes can take a bird's-eye view of the total problem, instead of that of an owl on a segment. They can encompass wide generalizations from experience that a judge is precluded from making in his decision on a particular case. Legislatures can break sharply with the past, if need be, as judges ordinarily cannot. They avoid the wasteful cost in time and money of piecemeal litigation that all too frequently culminates in a crazy quilt of rules defying intelligent restatement or coherent application. They can take the initiative in timely solution of urgent problems, in contrast with the inertia incumbent upon judges until random litigation

brings a problem in incomplete form to them, often too soon or too late for over-all solution.

As the legislators tend their factories replete with machinery for the massive fabrication of law, judges work away much as before at the fine interweaving that gives law the grace of coherent pattern as it evolves. Paradoxically, the more legislators extend their range of lawmaking, of statutory innovation and reform at a hare's speed, the more significant becomes the judge's own role of lawmaking, of reformation at the pace of the tortoise. Even at a distance from the onrushing legislators they can make their presence felt. It has been known since the days of Aesop that the tortoise can overtake the zealous hare; La-Fontaine has noted that it does so while carrying a burden. The frailty of the hare is that for all its zeal it tends to become distracted. The strength of the tortoise is its very burden; it is always in its house of the law.

Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law in the bounds of stare decisis. He invariably takes precedent as his starting-point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions, or lacking these, the given dicta, or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past.

Moreover, the judge is confined by the record in the case, which in turn is confined to legally relevant material, limited by evidentiary rules. So it happens that even a decision of far-reaching importance concludes with the words: "We hold today only that . . . . We do not reach the question whether . . . ." Circumspectly the weaver stops, so as not to confuse the pattern of transition from yesterday to today. Tomorrow is time enough for new weaving, as the facts of tomorrow come due.

A decision that has not suffered untimely birth has a reduced risk of untimely death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to the evolutionary course of the law, and hence with a minimum of shock to those who act in reliance upon judicial

decisions. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily makes advances though it carries the past on its back.

The very caution of the judicial process offers the best of reasons for confidence in the recurring reformation of judicial rules. A reasoning judge's painstaking exploration of place and his sense of pace, give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression. There are times when he encounters so much chaos on his long march that the most cautious thing he can do is to take the initiative in throwing chaos to the winds. The great Judge Mansfield did so when he broke the chaos of stalemated contractual relations with the concept of concurrent conditions. Holmes and Brandeis did so when they cleared the way for a liquidation of ancient interpretations of freedom of contract that had served to perpetuate child labor. Cardozo did so when he moved the rusting wheels of *Winterbottom v. Wright*[1] to one side to make way for *MacPherson v. Buick Motor Co.*[2] Chief Justice Stone did so, in the chaotic field of conflict of laws, when he noted the leeway in the United States Constitution between the mandate of the full faith and credit clause and the prohibition of the due process clause.[3]

To a reasoning judge, each case is a new piece of an ever-expanding pattern, to be woven in if possible by reference to precedent. If precedent proves inadequate or inept, he is still likely to do justice to it in the breach, setting forth clearly the disparity between the expansively novel facts before him and the all too square precedents that now fail to encompass them. He has also the responsibility of justifying the new precedent he has evolved, not merely as the dispossessor of the old, but as the best of all possible replacements. His sense of justice is bound to infuse his logic. A wise judge can strengthen his overruling against captious objections, first by an exposition of the injustice engendered by the discarded precedent, and then by an articulation of how the injustice resulted from the precedent's failure to mesh with accepted legal principles. When he thus speaks out, his words may serve to quicken public respect for the law as an instrument of justice.

He is hardly eager to take on such tasks if he can do otherwise. He knows that a new rule must be supported by full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solu-

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[1] 152 Eng. Rep. 402 (Ex. 1842).

[2] 217 N.Y. 382, 111 N.E. 1050 (1916).

[3] Yarborough v. Yarborough, 290 U.S. 202, 214 (1933) (dissenting opinion).

tion. Thereafter the opinion must persuade his colleagues, make sense to the bar, pass muster with scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it. There is usually someone among them alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond the problem at hand. Every opinion is thus subject to approval. It is understandable when a judge, faced with running such a gantlet, marks time instead on the line of least resistance and lets bad enough alone.

Moreover, he may still be deterred from displacing an inherently bad or moribund precedent by another restraint of judicial office—the tenet that the law must lag a respectful pace back of popular mores, not only to insure its own acceptance, but also to delay formalization of community values until they have become seasoned.

The tenet of lag, strengthening the already great restraints on the judge, is deservedly respected. It bears noting, however, that it is recurringly invoked by astute litigants who receive aid and comfort from law that is safely behind the times with the peccadillos of yesteryear and has not caught up with their own. At the slightest sign that judge-made law may move forward, these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously, and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from antiquated legal lore.

Too often the real danger to law is not that judges might take off onward and upward, but that all too many of them have long since stopped dead in the tracks of their predecessors. They would command little attention were it not that they speak the appealing language of stability in justification of specious formulas. The trouble is that the formulas may encase notions that have never been cleaned and pressed and might disintegrate if they were. We might not accept the formulas so readily were we to realize what a cover they can be for the sin the Bible calls sloth and associates with ignorance. Whatever the judicial inertia evinced by a decision enveloped in words that have lost their magic, it is matched by the profession's indifference or uncritical acceptance. Thus formula survives by default.

Stare decisis, to stand by decided cases, conjures up another phrase dear to Latin lovers—*stare super antiquas vias*, to stand on the old paths.

One might feel easier about that word *stare* if itself it stood by one fixed star of meaning. In modern Italian *stare* means to stay, to stand, to lie, or to sit, to remain, to keep, to stop, or to wait. With delightful flexibility it also means to depend, to fit or to suit, to live and, of course, to be.

Legal minds at work on this word might well conjecture that to *stare* or not to *stare* depends on whether *decisis* is dead or alive. We might inquire into the life of what we are asked to stand by. In the language of *stare decisers*: *Primo*, should it ever have been born? *Secundo*, is it still alive? *Tertio*, does it now deserve to live?

Who among us has not known a precedent that should never have been born? What counsel does not know a precedent worn so thin and pale with distinctions that the court has never troubled to overrule it? How many a counsel, accordingly misled, has heard the court then pronounce that the precedent must be deemed to have revealed itself as overruled *sub silentio* and ruminated in bewilderment that the precedent on which he relied was never expressly overruled because it so patently needed to be?

The notion yet persists that the overruling of ill-conceived, or moribund, or obsolete precedents somehow menaces the stability of the law. It is as if we would not remove barriers on a highway because everyone had become accustomed to circumventing them, and hence traffic moved, however awkwardly. The implication is that one cannot render traffic conditions efficient without courting dangers from the disturbance of established habit patterns. We have reached such a pass, we are wont to say, that it is for the legislature and not the court to set matters aright. No one says it more than the courts themselves.

Why? One speculation is that the popular image of the legislature as the lawmaking body, in conjunction with a popular notion of contemporary judges as primarily the maintenance men of the law, has engendered an auxiliary notion that whatever incidental law courts create they are bound to maintain unless the legislature undertakes to unmake it.

One can speculate further that the occupational caution of judges makes them reluctant to take the initiative in overruling a precedent whose unworthiness is concealed in the aura of stare decisis. It takes boldness to turn a flashlight upon an aura and call out what one has seen, at the risk of violating quiet for the benefit of those who have retired from active thought. It is easier for a court to rationalize that less shock will result if it bides its time, and bides it, and bides it, the

while it awaits legislative action to transfer an unfortunate precedent unceremoniously to the dump from the fading glory in which it has been basking.

Thus courts have maintained their own theatre of the absurd. For generations since the 1787 rule of *Jee v. Audley*,[4] for example, they earnestly pretended that ancient crones could have babies. Again, even after the advent of conclusive blood tests to the contrary, they could still pretend that anyone might be a father.[5] Flattering though it may have been to a crone to be viewed as a possible mother of the year though she would never have a child to show for it, it can only have been disquieting to a man to be named as an actual father of someone who was no child of his.

Fortunately all is not saved. In retrospect we come to see how well courts now and again do clear a trail for those who come after them. They have significantly expanded the concept of obligation. They are recognizing a much needed right to privacy.[6] They are recognizing a right to recovery for prenatal injuries[7] and intentionally inflicted mental suffering.[8] They are also recognizing liability once precluded by charitable[9] or governmental immunities.[10] Their now general acceptance of the manufacturer's liability to third persons for negligence has stimulated inquiry into appropriate bases for possible strict liability for injuries resulting from defective products.[11] There is more and more open preoccupation with compensation for personal injuries, which is bound in turn to augment the scope of insurance.[12]

Courts are also recognizing new responsibilities within the family

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[4] 29 Eng. Rep. 1186 (1787).

[5] Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P.2d 1043 (1937); Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (Dist. Ct. App. 1946), *overruled by statute*, Cal. Civ. Proc. Code §§ 1980.1-.7 (West 1955).

[6] Griswold v. Connecticut, 381 U.S. 479 (1965); *cf.* Stanley v. Georgia, 394 U.S. 557 (1969). *See generally* Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

[7] Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

[8] State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

[9] Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951).

[10] Muskoph v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[11] Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

[12] *See* A. Ehrenzweig, "Full Aid" Insurance for the Traffic Victim: A Voluntary Compensation Plan (1954); L. Green, Traffic Victims: Tort Law and Insurance (1958); R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance (1965).

as well as new freedoms. They are recognizing the right of one member of the family to recover against another.[13] They are recognizing women as people with lives of their own, transcending their status as somebody else's spouse or somebody else's mother, transcending somebody else's vision of what nonentities they should be.[14]

In conflicts of law, wooden rules are giving way as surely as wooden boundary lines.[15] Comparable changes are on the horizon in property law that will reflect new ways of holding and transferring property, and evolving concepts of land use, zoning, and condemnation.[16] Criminal law is beginning to reflect new insights into human behavior.[17] Landmark cases in constitutional law evince major changes in the relation of the federal government to the states.[18]

A judge participates significantly in lawmaking whether he makes repairs and renewals in the common law via the adaptation of an old precedent or advances its reformation with a new one. He does so on a variety of fronts, in the interpretation of statutory or constitutional language as well as in the analysis of traditional common law problems.

Rare are the statutes that rest in peace beyond the range of controversy. Large problems of interpretation inevitably arise. Plain words, like plain people, are not always so plain as they seem. Certainly a judge is not at liberty to seek hidden meanings not suggested by the statute or the available extrinsic aids. Speculation cuts brush with the question: What purpose did the legislature express as it strung its word into a statute? An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more

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[13] Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

[14] People v. Pierce, 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964).

[15] Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

[16] The American Law Institute is currently at work on a Model Land Development Code.

[17] People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); People v. Baker, 42 Cal. 2d 550, 268 P.2d 705 (1954).

[18] Miranda v. Arizona, 384 U.S. 436 (1966); Fay v. Noia, 372 U.S. 391 (1963); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954).

than passive reading, to consider well their context, to ponder what may be their consequences.[19] Such a task is not for the phlegmatic. It calls for judicial temperament, for impassive reflection quickened with an awareness of the waywardness of words.

There are times when statutory words prove themselves so at odds with a clear legislative purpose as to pose a dilemma for the judge. He knows that there is an irreducible minimum of error in statutes because they deal with multifarious and frequently complicated problems. He hesitates to undertake correction of even the most obvious legislative oversight, knowing that theoretically the legislature has within its power the correction of its own lapses. Yet he also knows how cumbersome the legislative process is, how massive the machinery that must be set in motion for even the smallest correction, how problematic that it will be set in motion at all, how confusion then may be worse confounded.

With deceptively plain words, as with ambiguous ones, what a court does is determined in the main by the nature of the statute. It may be so general in scope as to invite judicial elaboration. It may evince such careful draftsmanship in the main as to render its errors egregious enough to be judicially recognized as such, inconsistent with the legislative purpose.

The experienced draftsmen of tax laws, among others, find it impossible to foresee all the problems that will test the endurance of their words. They did not foresee, for example, the intriguing question whether the United States is a resident of the United States, which arose under a revenue act taxing interest received by foreign corporations from such residents. What to do when a foreign corporation received interest from the United States? Mr. Justice Sutherland decided that this country resided in itself. He found a spirit willing to take up residence though the flesh was weak, if indeed not entirely missing. The ingenuity of the solution compels admiration, whatever misgivings it may engender as to our self-containment.[20]

So the courts now and again prevent erratic omissions or errant words from defeating legislative purpose, even though they thereby disregard conventional canons of construction. We come upon an intriguing but quite different problem when we consider what should be the fair import of legislative silence in the wake of statutory interpretation em-

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[19] People v. Knowles, 35 Cal. 2d 175, 182, 217 P.2d 1, 5 (1950).

[20] Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934).

bodied in the occasional precedent that proves increasingly unsound in the solution of subsequent cases. Barring those exceptional situations where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, the court should be free to overrule such a precedent despite legislative inaction.

It is unrealistic to suppose that the legislature can note, much less deliberate, the effect of each judicial interpretation of a statute, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the legislature to repudiate an erroneous judicial interpretation amounts to an incorporation of that interpretation into the statute not only assumes that the legislature has embraced something that it may not even be aware of, but bars the court from reexamining its own error—consequences as unnecessary as they are serious.

It is ironic that an unsound interpretation of a statute should gain strength merely because it has stood unnoticed by the legislature. It is a mighty assumption that legislative silence means applause. It is much more likely to mean ignorance or indifference.[21] Thus time after time a judicial opinion calls out loud and clear that there is an unresolved problem or patent injustice that can be remedied only by the legislature. The message may be heard round the world of legal commentators who listen intently for such reports. Rarely, however, does it reach the ears of legislators across the clamor and the static of legislative halls. It would be high comedy, were it not for the sometimes sad repercussions, that we are wont solemnly to attribute significance to the silence of legislators. There can be idle silence as well as idle talk.

In spelling out rules that form a Morse code common to statutes and judicial decisions, and in the United States common even to the Constitution of the country and the constitutions of the states, courts keep the law straight on its course. That high responsibility should not be reduced to a mean task of keeping the law straight and narrow. It calls for literate, not literal, judges.

Hence we should not be misled by the half-truth that policy is a matter for the legislators to decide. Recurringly it is also for the courts to decide. There is always an area not covered by legislation in which they must revise old rules or formulate new ones, and in that process policy may be an appropriate and even a basic consideration. The

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[21] *See* Boys Market, Inc. v. Retail Clerks Local 770, 38 U.S.L.W. 4462 (U.S. June 1, 1970).

briefs carry the first responsibility in stating the policy at stake and demonstrating its relevance; but if they fail or fall short, no conscientious judge will set bounds to his inquiry. If he finds no significant clues in the law books, he will not close his eyes to a pertinent study merely because it was written by an economist or perhaps an anthropologist or an engineer.

We need not distrust judicial scrutiny of such extralegal materials. The very independence of judges, fostered by judicial office even when not guaranteed by tenure, and their continuous adjustment of sight to varied problems tend to develop in the least of them some skill in the evaluation of massive data. They learn to detect latent quackery in medicine, to question doddered scientific findings, to edit the swarm spore of the social scientists, to add grains of salt to the fortune-telling statistics of the economists. Moreover, as with cases or legal theories not covered by the briefs, they are bound in fairness to direct the attention of counsel to such materials, if it appears that they may affect the outcome of the case, and to give them the opportunity to submit additional briefs. So the miter square of legal analysis, the marking blades for fitting and joining, reduce any host of materials to the gist of a legal construction.

Regardless of whether it is attended by abundant or meager materials, a case may present competing considerations of such closely matched strength as to create a dilemma. How can a judge then arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what?

He is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severly discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception. Disinterest, however, even distinterest envisaged on a higher plane than the emotional, is only the minimum qualifications of a judge for his job. Then what more?

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented, an honest term to describe the stubbornly rational search for the optimum decision. Would we have it otherwise? Would we give up the value judgment for an abdication of judical responsibility, for the toss of the two-faced coin?

In sum, judicial responsibility connotes far more than a mechanical application of given rules to new sets of facts. It connotes the recurring formulation of new rules to supplement or displace the old. It connotes the recurring choice of one policy over another in that formulation, and an articulation of the reasons therefor.

Even so much, however, constituting the judicial contribution to lawmaking, adds up to no more than interweaving in the reformation of law. If judges must be much more than passive mechanics, they must certainly remain much less than zealous reformers. They would serve justice ill by weaving samplers of law with ambitious designs for reform. Judges are not equipped for such work, confined as they are to the close work of imposing design on fragments of litigation. Dealing as they do with the bits and pieces that blow into their shop on a random wind, they cannot guess at all that lies outside their line of vision nor foresee what may still appear.

As one who has declared himself against the perpetuation of ancient fabrics that no longer shield us from storms, if they ever did, I should like now to voice a cautionary postscript against judges rushing in where well-meaning angels of mercy tread, hawking their new methods of fabrication. The zealots of law reform too often are as indifferent to exacting standards of quality control as the mechanics of the status quo. Moreover, we cannot be so tolerant of heedless ventures in new directions in courts as in legislatures, given the constant risk that judicial error will become frozen as stare decisis.

We could wish that modern legislatures, often abundantly equipped to carry the main responsibility for lawmaking, would be weaving grand designs of law as informed and inspired reformers. Instead we must rue with Judge Friendly: *The Gap in Lawmaking*—

Judges Who Can't and Legislators Who Won't.[22] He laments that "the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed." [23]

Certainly courts are helpless to stay the maddening sequences of triumphal entry and sit-in. What is frustration to them, however, could be challenge to the scholars. Steeped in special knowledge of one field or another, they can well place their knowledge at the service of legislatures for the plowing of the fields, for their sowing and their care. Who but the scholars have the freedom as well as the nurturing intellectual environment to differentiate the good growth from the rubbish and to mark for rejection the diseased anachronism, the toadstool formula, the scrub of pompous phrases?

There is a tragic waste in the failure to correlate all our machinery for vigil to maximum advantage. Is it not time to break the force of habit that militates against steady communication between legislators in unplowed fields and scholarly watchbirds in bleachers? It is for no more sinister reason than lethargy that we have failed in large measure to correlate the natural resources of legislators who have an ear to the ground for the preemption of new fields and of scholars who have an eye on their long-range development.

Perhaps we can make a beginning by calling upon legislators to take the initiative in establishing permanent lines of communication. The scholars can hardly take that initiative, for they are not lobbyists. Why not invite their ideas through the good offices of a legislative committee that can insure their careful consideration? Why not, particularly when some legislatures are now equipped with permanent legislative aids, and here and there law schools have now set up legal centers, and there remains only to set up permanent lines of communication between them? The natural agency for such communication is a law revision commission such as those long since established in New York and California or the ones established for England and Scotland by the 1965 Law Commissions Act.

A law school offers an ideal environment for such a commission. It could there devote itself wholeheartedly to the formulation and drafting of statutes as well as to continuing re-examination of their fitness for survival. It could withstand the prevailing winds of pressure groups as it made timely use of the abundant wasting assets of scholarly studies. One can hardly imagine more valuable interchange for the law than that

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[22] 63 COLUM. L. REV. 787 (1963).

[23] *Id.* at 792.

between those entrusted to review it critically and those entrusted to draft proposals for its revision. On a wide front they could collaborate in long-range studies of legal needs that would richly complement the applied research that legislatures recurringly ask of their legislative aids. In turn the work of the commissions would offer hearty sustenance not only to the law reviews but to all the other projects of a law school, not the least of which is the classroom. Such permanent relationships between law schools and law revision commissions, going far beyond today's occasional associations, would strengthen their beneficent influence on legislation.

Perhaps the story of law reform would get better as it went along if scholars steadily established quality controls for the weaving of law, spurring legislators to legislate when necessary and to legislate well, and untangling the problems that advance upon courts, to smooth the task of judicial decision. There comes to mind a story of pioneering times called *The Weaver's Children*, which begins: "Many years ago a little wooden mill stood in a ravine. . . . The little mill filled the space between a rushing stream and a narrow road."

The mill might symbolize the world of scholars, in law schools or on law revision commissions, in legislatures or courts, as well as in public or private practice. The weavers in the mill would keep a weather eye out for the volume and course of the rushing stream, of life itself, to calculate the tempo for the weaving of statutes. They would also keep a weather eye out for traffic conditions on the narrow road, estimating therefrom the tempo at which motley caravans could unload their variegated sacks of litigation. The mill would be a model of rational methods of weaving.

There was not such a model in an age when a narrow version of reasoning, the mechanical logic grounded in old forms of action, served as a quality control on a mean plane. Even today there is not such a model. We have yet to attain the ideal quality control, a tradition of reasoning on a noble plane that would still foster alertness in both the mass producers and the interweavers of law against excesses or deficiencies in their work.

We could come to the pessimistic conclusion that we have little basis for believing in any new circle of law as a miracle, however theatrical its initial twists and turns. I have not come full circle round, however, only to yield to pessimism. I like to believe instead that in time the children of weavers would bring such reasoning into the design and fabrication of the circles as to keep them on course for the long run,

without ever boxing them in. Even in the absence of any clear and convincing evidence, I shall continue to believe that, not as a matter of logic, but as an act of faith.